STATE OF MICHIGAN

COURT OF APPEALS

EBONY WILSON, through her Next Friend, VALERIE WILSON,

Plaintiff-Appellant,

v

DETROIT SCHOOL OF INDUSTRIAL ARTS, SCHOOL HOUSE SERVICES & STAFFING, INC, PRINCIPAL OF DETROIT SCHOOL OF INDUSTRIAL ARTS, and VICE PRINCIPAL OF DETROIT SCHOOL OF INDUSTRIAL ARTS,

Defendants-Appellees,

and

CENTRAL MICHIGAN UNIVERSITY,

Defendant.

UNPUBLISHED
May 9, 2006

No. 265508
Wayne Circuit Court
LC No. 04-418242-CZ

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendants. We affirm.

In March 2002, plaintiff began her freshman year as a student at defendant Detroit School of Industrial Arts (school), a public school academy chartered by Central Michigan University. Plaintiff filed a complaint against the school, the school's principal and vice principal, School House Services and Staffing, Inc. (School House Services), and Central Michigan University,[1] alleging that Maurice Lamont Nyx, a counselor and Dean of Students at defendant school who was responsible for student discipline, sexually assaulted plaintiff in an abandoned and unlit

[1] Central Michigan University was dismissed from the lawsuit by an order of voluntary dismissal under MCR 2.504(A)(1)(a). Central Michigan University is therefore not a party to this appeal.

stairwell on defendant school's premises on two occasions when plaintiff was a fifteen-year-old freshman.[2] The assaults occurred during school hours. The complaint contained claims of negligence or gross negligence, vicarious liability under the doctrine of respondeat superior, negligent hiring, and violation of the Michigan Constitution.

Defendants moved for summary disposition under MCR 2.116(C)(7) and (10), arguing that plaintiff's negligence claim against defendant school was barred by governmental immunity, that the criminal activity of a third party was not foreseeable and that defendants therefore had no duty to protect plaintiff from Nyx's criminal behavior, and that plaintiff's claim of vicarious liability under the doctrine of respondeat superior was not viable because Nyx's sexual assault of the victim was outside the scope of his employment under *Bozarth v Harper Creek Bd of Ed*, 94 Mich App 351; 288 NW2d 424 (1979). The trial court granted defendants' motion for summary disposition, holding that defendant school was entitled to governmental immunity and that Nyx's conduct was outside the scope of his employment and therefore under *Bozarth*, defendants were not vicariously liable under the doctrine of respondeat superior.

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999). Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by immunity granted by law. *Marchyok v Ann Arbor*, 260 Mich App 684, 687; 679 NW2d 703 (2004). To survive a motion for summary disposition based on governmental immunity, a plaintiff must allege facts justifying the application of an exception to governmental immunity. *Id.*

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant School House Services based on governmental immunity because School House Services is a private, for-profit corporation and the governmental immunity statute therefore does not apply. Defendants did not move for summary disposition on the ground that defendant School House Services was entitled to governmental immunity. At the hearing on defendants' motion for summary disposition, defense counsel specifically limited the defense of governmental immunity to defendant school and its principal and vice principal. Furthermore,

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[2] Nyx was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(iii), as a result of his sexual assaults of plaintiff, but this Court vacated those convictions because the trial court acquitted Nyx of the charged offenses and convicted him of two uncharged cognate lesser offenses, which is prohibited by *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). *People v Nyx*, unpublished opinion per curiam of the Court of Appeals, issued January 13, 2005 (Docket No. 248094).

neither the trial court's statements on the record at the hearing on defendants' motion for summary disposition nor the order granting defendants' motion for summary disposition indicates that the trial court, in granting summary disposition in favor of defendants, concluded that defendant School House Services had governmental immunity. We therefore find plaintiff's argument to be meritless.

Plaintiff also argues that the trial court erred in granting summary disposition in favor of the principal and vice principal of defendant school because they were employees of defendant School House Services, and not employed by defendant school itself. Therefore, plaintiff contends, the principal and vice principal are not entitled to raise the defense of governmental immunity.

"A public school academy is a public school under section 2 of article VIII of the state constitution of 1963 . . . ." MCL 380.501(1). Furthermore, a public school academy "is a governmental agency" and "[t]he powers granted to a public school academy . . . constitute the performance of . . . governmental functions . . . ." *Id.* Absent a statutory exception, a governmental agency is immune from tort liability when it exercises or discharges a governmental function. MCL 691.1407(1). Furthermore, an employee of a governmental agency is immune from tort liability for an injury to a person caused by the employee while in the course of employment if the employee is acting or reasonably believes he is acting within the scope of employment, if the employee is engaged in the exercise or discharge of a governmental function, and if the employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. MCL 691.1407(2)(a)-(c). Therefore, if defendants principal and vice principal are employees of defendant school, they are shielded by governmental immunity if the above requirements are satisfied.

According to plaintiff, the principal and vice principal[3] were hired by and are employed by defendant School House Services and therefore are not entitled to governmental immunity because defendant School House Services is a private, for-profit corporation. Although plaintiff made this argument in her brief opposing summary disposition and at the summary disposition hearing, the trial court did not explicitly address whether the principal and vice principal were "employees" of a governmental agency within the meaning of MCL 691.1407(2).[4]

Plaintiff is correct that an employee of a private corporation that is doing business with a public agency is not entitled to governmental immunity. See *Rambus v Wayne Co Gen Hosp*, 193 Mich App 268, 270-273; 483 NW2d 455 (1992), aff'd on reh 197 Mich App 480 (1992); *Roberts v Pontiac*, 176 Mich App 572, 578; 440 NW2d 55 (1989). However, viewing the evidence in a light most favorable to plaintiff, as the nonmoving party, we find that plaintiff failed to establish a genuine issue of material fact regarding whether the principal and vice principal were employed by defendant school, which is a governmental agency, or defendant

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[3] We observe that plaintiff sued the principal and vice principal in their official, rather than individual, capacities.

[4] The term "employee" is not defined in MCL 691.1407(2).

School House Services, which is a private corporation. Plaintiff presented no documentary evidence regarding the nature of the employment relationship between the principal and vice principal and either defendant school or defendant School House Services. Plaintiff, as the nonmoving party, could not rest upon mere allegations or denials in the pleadings, but was required, by documentary evidence, to set forth specific facts showing that there was a genuine issue for trial. MCR 2.116(G)(4); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The only documentary evidence that plaintiff attached to her response to defendants' motion for summary disposition was her own affidavit, which was silent regarding the nature of the employment relationship between the principal and vice principal and defendant school or defendant School House Services. Raising the issue of who employed the principal and vice principal in her response to defendants' motion for summary disposition and at the summary disposition hearing was not, without documentary evidence, sufficient to establish a genuine issue of material fact regarding this issue.

Plaintiff's argument presumes that if defendant School House Services hired the principal and vice principal, this fact conclusively establishes that defendant School House Services is the principal and vice principal's employer. That is not the end of the inquiry, however. The four-part economic reality test is the proper test to determine whether defendant School House Services was the principal and vice principal's employer. See *Ashker v Ford Motor Co*, 245 Mich App 9, 11-12; 627 NW2d 1 (2001). "'The factors to be considered in applying the economic reality test are (1) control; (2) payment of wages; (3) hiring and firing; and (4) responsibility for the maintenance of discipline.'" *Id.* at 12, quoting *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 648; 364 NW2d 670 (1984). Plaintiff failed to argue the economic reality test before the trial court or on appeal. In addition, plaintiff did not provide documentary evidence to establish that defendant School House Services was the employer under the economic reality test. We further observe that plaintiff did not even allege in her pleadings that the principal and vice-principal were employed by defendant School House Services. In her first amended complaint, plaintiff alleged merely that defendant "Schoolhouse Services and Staffing Inc., is a for-profit corporation" and that it "is the management company for [d]efendant [school]." In sum, we find that plaintiff's counsel has utterly failed to allege in her pleadings or present any documentary evidence establishing a genuine issue of material fact regarding whether the principal and vice principal were employees of defendant school or defendant School House Services. Summary disposition in favor of defendants principal and vice principal was therefore proper under both MCR 2.116(C)(7) and (10).

Plaintiff next argues that the trial court erred in granting summary disposition of plaintiff's negligence claim because there are factual issues regarding the existence of a legal duty and the foreseeability of a third party's criminal activity which should have been decided by a jury. In light of our conclusion that defendant school and its principal and vice principal are immune from liability under MCL 691.1407, we need not address plaintiff's arguments that those defendants owed plaintiff a duty. However, we will address plaintiff's argument regarding whether defendant School House Services owed a duty of care to plaintiff.[5]

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[5] The trial court did not specifically rule on the issue whether defendant School House Services
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The existence of a duty is ordinarily a question for the trial court to decide as a matter of law. *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Id.* We review de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Construction Co (On Remand)*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "[A] negligence action may be maintained only if a legal duty exists that requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm." *Graves v Warner Bros*, 253 Mich App 486, 492; 656 NW2d 195 (2002). In determining whether a duty exists, courts consider many different variables, including:

> (1) foreseeability of the harm, (2) degree of certainty of injury, (3) existence of a relationship between the parties involved, (4) closeness of connection between the conduct and injury, (5) moral blame attached to the conduct, (6) policy of preventing future harm, and (7) the burdens and consequences of imposing a duty and the resulting liability for breach. The mere fact that an event may be foreseeable is insufficient to impose a duty upon the defendant. [*Terry v Detroit*, 226 Mich App 418, 424; 573 NW2d 348 (1997) (citations omitted).]

In general, there is "no duty to protect another from the criminal acts of a third party in the absence of a special relationship between the defendant and the plaintiff or the defendant and the third party." *Graves*, *supra* at 493. "The rationale underlying this general rule is the fact that '[c]riminal activity, by its deviant nature, is normally unforeseeable.'" *Id.*, quoting *Papadimas v Mykonos Lounge*, 176 Mich App 40, 46-47; 439 NW2d 280 (1989). However, social policy has led courts to recognize an exception to this general rule where a special relationship exists between a plaintiff and a defendant. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Some examples of special relationships that have been recognized under Michigan law include a landlord and tenant, proprietor and patron, employer and employee, residential invitor and invitee, doctor and patient, carrier and passenger, and innkeeper and guest. *Graves*, *supra* at 494; *Marcelletti v Bathani*, 198 Mich App 655, 664; 500 NW2d 124 (1993). The rationale for "imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety." *Williams*, *supra* at 499.

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owed a duty of care to plaintiff. Generally, an issue must be raised before and addressed by the trial court to be preserved for appellate review. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; ___ NW2d ___ (2005). Nevertheless, we will review the issue because the existence of a duty is a question of law and ordinarily does not require the resolution of factual issues, *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979), and all the necessary facts have been presented. *Detroit Leasing Co*, *supra* at 237-238.

In this case, it is arguable that a special relationship exists between plaintiff and defendants school, principal, and vice principal. This Court has recognized that a special relationship exists between a teacher and a student. See *Gaincott v Davis*, 281 Mich 515, 518; 275 NW 229 (1937) ("At least in a limited sense the relation of a teacher to a pupil is that of one *in loco parentis*."); *Cook*, *supra* at 98, 101. However, that duty "is coterminous with the teacher's presence at school." *Cook*, *supra* at 98. Logically, a principal or vice principal has the same special relationship with students that a teacher has, with the imposition of the duty also being coterminous with the principal or vice principal's presence. Even assuming that defendant School House Services, as defendant school's management company, possessed a similar duty towards plaintiff, as a student of defendant school, which we do not decide today, we conclude that plaintiff has failed to establish the existence of a special relationship between defendant School House Services and plaintiff. Actual or constructive knowledge on the part of the defendant of some danger to be protected against is usually a critical factor in determining whether a special relationship exists. See *Samson v Saginaw Professional Bldg, Inc*, 393 Mich 393, 403-406; 224 NW2d 843 (1975). This is related to the requirement of foreseeability because foreseeability depends on knowledge. *Id.* at 405. The existence of a duty depends in part on foreseeability, i.e., whether it was foreseeable that the actor's conduct may create a risk of harm to the victim. *Goldman v Phantom Freight, Inc*, 162 Mich App 472, 481; 413 NW2d 433 (1987).

Plaintiff is correct that whether the risk of harm from third-party criminal activity is foreseeable in a particular case is generally a question of fact for the jury. *Holland v Liedel*, 197 Mich App 60, 63; 494 NW2d 772 (1992). However, in this case, plaintiff has wholly failed to satisfy her burden to establish a genuine issue of material fact. As we previously observed, the only documentary evidence that plaintiff attached to her response to defendants' motion for summary disposition was her own affidavit. Plaintiff failed to plead that any of the defendants had actual or constructive knowledge and presented no documentary evidence to indicate that defendant School House Services either knew or should have known that Nyx might sexually assault a student. Furthermore, in their response to plaintiff's reply to their motion for summary disposition, defendants presented documentary evidence showing that they procured a criminal background check of Nyx before hiring him, which revealed that Nyx had been arrested on one occasion for felony insurance fraud. The documentary evidence does not indicate that Nyx had any criminal convictions, however. More importantly, the criminal background check did not reveal that Nyx had ever been arrested for or convicted of criminal sexual conduct. Because plaintiff did not provide documentary evidence to support the conclusion that defendants were aware or should have been aware that Nyx might sexually assault a student, Nyx's conduct was not foreseeable. Therefore, plaintiff failed to establish a genuine issue of material fact regarding whether defendant School House Services owed a duty to plaintiff, and summary disposition was proper.

Plaintiff finally argues that the trial court erred in granting defendants' motion for summary disposition of plaintiff's vicarious liability claim.[6] The trial court granted summary

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[6] Plaintiff's vicarious liability claim is not barred by governmental immunity because Nyx's sexual assault of plaintiff did not constitute an "exercise of a governmental function" under MCL
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disposition of the vicarious liability claim based on *Bozarth*, *supra.* In *Bozarth*, we held that a "homosexual assault by a teacher on a student is clearly outside the scope of the teacher's employment. The *respondeat superior* doctrine, therefore, does not apply in such a situation to subject the governing school board to liability." *Bozarth*, *supra* at 353 (citation omitted). As we previously stated, plaintiff neither alleged in her pleadings nor provided documentary evidence to show that defendants either knew or had reason to know that Nyx might engage in criminal sexual conduct with a student. We therefore conclude that like the defendant in *Bozarth*, defendants in the instant case were not vicariously liable for Nyx's conduct toward plaintiff.

Affirmed.

/s/ Stephen L. Borrello
/s/ Henry William Saad
/s/ Kurtis T. Wilder

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691.1407. *Galli v Kirkeby,* 398 Mich 527, 537; 248 NW2d 149 (1976).